

1979

The Mountain States Telephone & Telegraph Co. v. Salt Lake City : Petition for Rehearing

Utah Supreme Court

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David E. Salisbury; Gerald R. Miller; Chris Wangsgard; Attorneys for Appellant;
Roger F. Cutler; Attorney for Respondent;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

MOUNTAIN STATES TELEPHONE)	
& TELEGRAPH COMPANY, a)	
corporation,)	Petition for Rehearing
)	
Plaintiff-Appellant)	Case No. 16000
)	
vs.)	
)	
SALT LAKE CITY, a body)	
corporate and politic under)	
the laws of the State of)	
Utah,)	
)	
Defendant-Respondent.)	
)	

I.

PETITION FOR REHEARING

Comes now Salt Lake City Corporation pursuant to the provisions of Rule 76(e)(1) of the Utah Rules of Civil Procedure and respectfully petitions the Court for a rehearing of its decision filed May 31, 1979.

The petition is made and based upon the following:

(a) The Court failed to note or consider the fact that the Appellant Company's Complaint purposely failed to allege that the City had "intentionally" or "systematically" failed to collect taxes on all those within the taxing class.

(b) The Court failed to note that there is no genuine material issue of fact of record demonstrating that the City has "intentionally" or "systematically" failed to tax all

within the appropriate class. Rather, the facts are not in dispute and demonstrate a good faith effort on part of the City to collect the tax against all those within the class. The Court apparently did not take cognizance of these undisputed facts.

II.

ARGUMENT

POINT I

THE PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED FOR ALLEGED DISCRIMINATION APPLICATION OF A TAXING STATUTE.

The law clearly provides that, even under notice of pleading, a plaintiff must allege ultimate facts establishing the prima facie elements of a legal theory in order to state a cause of action. A good summary of the law is as follows:

"The plaintiff's declaration or complaint should contain a direct and positive averment of all the ultimate facts, as distinguished from evidentiary facts, necessary to state a cause of action in the plaintiff's favor and against the defendant, . . .

"Notwithstanding changes that have been introduced by modern systems of pleading, it still remains the duty of the plaintiff to state his cause of action in his . . . complaint . . . and it is still the right of the defendant to be apprised thereby of the facts which are believed to constitute the plaintiff's cause of action." 61 Am.Jur.2d Pleading §71 at p. 511 (Emphasis added)

This treatise summarized:

"The plaintiff's allegations must, if proved as laid, be such as to show as a matter of law the essential elements of a cause of action in his favor, . . ." 61 Am.Jur.2d Pleading §71 at p. 511 (Emphasis added).

Utah has, likewise, asserted that the pleadings must be stated with reasonable clarity, so the other party will have notice of what proof is needed to rebut the claims. It has observed:

". . .Our rules require that the basis of claim must be stated with reasonable certainty and clarity, so the other party will have notice of what he is obliged to meet." Christopher v. Larson Ford Sales, 557 P.2d 1009, 1011 (Utah, 1976), citing Rule 8 U.R.C.P. and Blackham v. Snelgrove, 280 P.2d 453 (Utah, 1955) (Emphasis added).

Under the law clearly enunciated by this Court, a dissident taxpayer (to challenge the application of a taxing provision) is obligated to allege that the government "intentionally" and "systematically" failed to collect taxes from all those within the scope of the taxing provision. This Court has succinctly held that the mere failure to collect a tax from one taxpayer or one group of taxpayers is not grounds to hold that the governmental entity has illegally or discriminatorily imposed a tax. Rather (as reaffirmed in the first decision of the within case), it must be alleged and proved that the governmental entity has engaged in the "systematic" and "intentional" failure to enforce the statute equally. Thiokol Chemical Corporation v. Peterson, 393 P.2d 391 (1964) cited in this Court's first

opinion at p. 4.

The Telephone Company in its Complaint alleged, generally, that the City failed to uniformly tax other businesses similarly situated; however, no allegation asserted that the City "intentionally" or "systematically" failed to collect the tax from all those within the purview of the ordinance's provisions. See paragraph 20-22 of plaintiff's Complaint; R-439 and quoted in the Court's May 31, 1979 opinion at p. 3.

It appears that the Telephone Company was urging that any failure to collect from one taxpayer, regardless of the intention or motivation of the government, created an excuse for the appellant, likewise, to refuse to pay. Such a position is clearly contrary to law. Since there was no allegation on these prime elements, plaintiff-appellant's Complaint was fatally defective. Therefore, it was properly dismissed, as a matter of law, by the lower court.

The Company's failure to allege a systematic and intentional scheme to discriminatorily apply the tax makes its Complaint fatally defective on the sole remaining issue of this case. Thus, it is respectfully submitted that the lower court decision dismissing plaintiff's complaint on the City's Motion for Summary Judgment should be affirmed.

POINT II

THE PURPOSE OF A SUMMARY JUDGMENT MOTION
IS TO PIERCE THE PLEADINGS AND RESOLVE

DISPUTES AS A MATTER OF LAW, WHERE NO GENUINE MATERIAL ISSUE OF FACT EXISTS. EVEN IF ONE ACCEPTED ARGUENDO THAT PLAINTIFF'S COMPLAINT STATED A CAUSE OF ACTION FOR DISCRIMINATORY APPLICATION OF A VALID TAXING STATUTE, THE FACTS OF RECORD ENTITLE THE CITY TO A SUMMARY JUDGMENT.

It is the purpose of a summary judgment motion, when accompanied with affidavits, to pierce the pleadings. Rule 56 succinctly states:

"When a motion for summary judgment is made and supported as provided by this Rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56(e) Utah Rules of Civil Procedure (Emphasis added).

Concerning this rule the Court on frequent occasions has stated:

"A party may not rely upon allegations in the pleadings to counter affidavits made upon personal knowledge stating facts contrary to the allegations of the pleadings." Freed Finance Company v. Stoker Motor Company, 537 P.2d 1039, 1040 (Utah, 1975).

Viewing the facts in light most favorable to the Telephone Company, there is nothing of record even purporting to suggest that the City was acting "intentionally" or "systematically" to enforce the tax exclusively against it and excluding others appropriately within the taxing classification. Even the most generous reading of Mr.

Madsen's affidavit (R-269) only suggests that the Telephone Company has lost ground in its competitive position, since it has become subject to competition on terminal line sales.

There is no sworn assertion of record that the City has "intentionally" or "systematically" failed to equally enforce or attempt to enforce its taxes to all within the purview of the ordinance.

On the contrary, the affidavit of the attorney for the City handling the collection processes expressly averred under oath that:

(1) The City vigorously attempted to resolve any factual and legal disputes; it had, with vigor, attempted in good faith to enforce its taxing ordinances against all persons who were legally within its provisions;

(2) The City intends to collect and enforce the taxing ordinances against all who are within its purview. See Affidavit of Mr. Walter Miller, R-257, 258 and quoted verbatim in Appendix "1" attached hereto for the Court's convenient reference.

The unrebutted affidavit of Mr. Miller is competent and admissible in all particulars, particularly in light of no written motion to strike. Further, as above stated there is a total absence of any contrary competent evidence.

Therefore, it is respectfully submitted that the

Court's first opinion in the above captioned matter should be amended to take cognizance of the status of the record which was apparently overlooked at the first deliberation. That is, there is no genuine material issue of fact as to the legal issue of an intentional systematic scheme to avoid collecting the tax against all those who fall within its perview.

Thus, it is respectfully submitted that the lower court was not in error in dismissing the Company's Complaint as a matter of law. The City-Respondent respectfully prays that the opinion first issued in this matter be amended to so reflect.

III

CONCLUSION

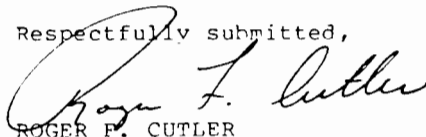
The Court failed to take cognizance of the fact that the Company failed to appropriately allege the prima facie elements to sustain an assertion that the City discriminatorily applied a taxing statute. It failed to aver an intentional and systematic failure to properly apply the tax to all within the taxing class.

Further, the Court misconstrued or overlooked undisputed material facts demonstrating that the City was not engaged in a systematic and intentional failure to equally apply its tax. Those unrebutted facts establish that the City has in good faith proceeded to collect the tax against

all within the classification.

Therefore, the Court's opinion filed May 31, 1979 should be amended to hold that there is no genuine material issue of fact and that the lower court's decision should be affirmed in all particulars.

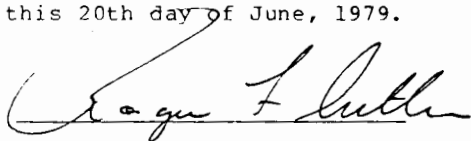
Respectfully submitted,



ROGER F. CUTLER
City Attorney
Attorney for Respondent
101 City & County Building
Salt Lake City, Utah 84111
Telephone: 535-7788

CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Petition for Rehearing to Chris Wangsgard, Van Cott, Bagley, Cornwall & McCarthy, 141 East First South, Salt Lake City, Utah 84111, by depositing the same in the U.S. mail, postage prepaid, this 20th day of June, 1979.

A handwritten signature in cursive script, reading "Eugene F. Luthi", written over a horizontal line.

APPENDIX "1"

ROGER F. CUTLER
City Attorney
Attorney for Defendant
101 City & County Building
Salt Lake City, Utah 84111
Telephone: 535-7788

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

MOUNTAIN STATES TELEPHONE)	
AND TELEGRAPH COMPANY, a)	
corporation,)	AFFIDAVIT
)	
Plaintiff,)	Civil No. 78 1539
)	
vs.)	
)	
SALT LAKE CITY, a body)	
corporate and politic under)	
the laws of the State of Utah,)	
)	
Defendant.)	
_____)	

STATE OF UTAH)
 : ss.
County of Salt Lake)

WALTER R. MILLER, being first duly sworn upon oath, deposes and says:

1. He is the duly appointed Deputy City Attorney for Salt Lake City Corporation and has been since July 1, 1977.

2. Through his employment with Salt Lake City, affiant is familiar with Sections 20-3-14 and 20-3-14.1 of the Revised Ordinances of Salt Lake City, Utah, 1965, which ordinances relate

to revenue taxes on public utilities and on businesses in competition with public utilities, respectively.

3. Affiant is likewise familiar with the term "basic local exchange services revenues" as such term is used in Section 20-3-14 of the aforesaid ordinances, namely as a specification of the telephone business revenues against which the revenue taxes are levied.

4. Notices have been sent by the City Attorney's office to all major companies which, to affiant's knowledge, install interconnect telephone systems within Salt Lake City limits (excepting Mountain Bell), informing them of their tax liabilities under the ordinances specified above and threatening legal action on failure to tender payment under the terms of said ordinances.

5. Affiant has had numerous meetings, correspondence, and conversations with counsel for and employees of Mountain Bell and with counsel for and representatives of businesses in competition with Mountain Bell, with regard to legal arguments raised by said competitors in response to passage of said ordinances and to the City's demands for payment, particularly with regard to the definition of the term "basic local exchange services" as used in said ordinances.

6. Based on such communications, said term appears to affiant to be a term of art, used in the telephone industry. Affiant has been unable to ascertain any agreement between

Mountain Bell and its competitors on the definition of said term; Mountain Bell representatives contending that the term relates to all terminal equipment services while representatives of competitors maintain that the term, as commonly used in the industry, does not relate to terminal telephone equipment sales and services, or in any respect to the subject matter of their trade.

7. Affiant has received from Bruce P. Savpol, counsel for several interconnect telephone dealers, a copy of what purports to be a portion of transcribed testimony by a terminal equipment expert sustaining the position of such dealers with respect to the meaning of the term "basic local exchange services." Said counsel has represented to affiant that further verification of said expert's sworn testimony, taken at deposition, will be delivered to affiant upon completion of transcription.

8. Salt Lake City fully intends to collect said taxes and enforce said ordinances as soon as definitional, legal and conceptual problems in this specialized industry can be resolved.

DATED this 15th day of June, 1978.

/s/ Walter R. Miller
WALTER R. MILLER

Subscribed and sworn to before me this 15th day of June,
1978.

/s/ Roger F. Cutler
NOTARY PUBLIC, residing in
Salt Lake City, Utah

My Commission Expires:

December 21, 1979

CERTIFICATE OF MAILING

I hereby certify that I have received a copy of the
foregoing Affidavit, this 16th day of June, 1978, for and on
behalf of

MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY, Plaintiff

By /s/ Chris Wansgaard